No. 95-809

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.,
Petitioners,
vs.
PAUL L. SPINK, et al.,
Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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In his Brief in Opposition, respondent argues that certiorari should be denied on both of the issues presented by the petition. On the first issue -- whether the Ninth Circuit erred by holding that Lockheed violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, by amending the terms of its pension plan while acting in its capacity as plan sponsor -- respondent argues that the Ninth Circuit's decision can somehow be reconciled with the abundant body of case law from other circuits which uniformly holds that a plan sponsor does not act in a fiduciary capacity when amending its plan. Respondent's argument ultimately relies upon circular reasoning, because there is no statutory or logical basis for holding that a plan sponsor can engage in a prohibited transaction which violates ERISA § 406 unless the act of amending the plan itself constitutes a breach of fiduciary duty. The Ninth Circuit's unprecedented holding that a plan sponsor can incur liability under ERISA deserves review, because it imposes fiduciary liability upon a plan sponsor which acts in a wholly non-fiduciary capacity.

On the second issue presented for review -- whether the new pension benefit accrual rules adopted by the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986") apply retroactively -- the principal argument raised by respondent is that this Court should overlook the Ninth Circuit's failure to properly interpret *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), simply because the Ninth Circuit cited *Landgraf* in its opinion and acknowledged that *Landgraf* is the controlling authority. Respondent's further argument that the Ninth Circuit correctly found the statute to apply retroactively is based upon an interpretation of statutory language which strains the

bounds of the English language, and also requires the Court to overlook the contrary administrative interpretation of the same statutory language by the Internal Revenue Service ("IRS"), the agency which concededly has authority for enforcing this provision of OBRA 1986.

Respondent also argues that neither issue is sufficiently important to deserve this Court's review, even if the Ninth Circuit did err in expanding the scope of fiduciary liability under ERISA or incorrectly impose OBRA 1986's pension benefit accrual rule retroactively. This is plainly wrong, because these issues are critical to every employer in the United States which sponsors a pension plan. This is demonstrated not just by the petition, but by the fact that five responsible organizations representing the interests of over 200,000 employers throughout the United States have requested leave to a file briefs as *amici curiae*, in support of the petition for certiorari. The issues presented in this case are far-reaching and of utmost significance to plan sponsors and the American business community, and deserve review by this Court.

I. THE NINTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THE DECISIONS OF THE OTHER CIRCUITS.

The decision below is the only reported decision which holds that a pension plan sponsor violates ERISA when it amends its plan in a manner which satisfies ERISA's minimum participation, funding, and vesting requirements. The Ninth Circuit's opinion leaves no doubt that liability is based upon the act of amending a plan. "[W]e conclude that the Lockheed's [sic] adoption of the 1990 Plan amendments violated ERISA because the

amendments provided for use of Plan assets to purchase a significant benefit for Lockheed." Pet. App. at 18a.

Respondent does not dispute that every other circuit to consider the issue has expressly declared that pension and welfare plan sponsors act in a settlor, rather than fiduciary, capacity when amending an ERISA plan.[1] Respondent nonetheless attempts to confuse this issue by relying upon the fact that Lockheed is a named fiduciary under the Plan, and that several of the individual defendants are also fiduciaries insofar as they act as Plan trustees and are required by ERISA to follow the terms of the Plan. All of this is beside the point, however, because a corporation which sponsors a plan wears "two hats" in dealing with the plan: a "corporate hat" when it creates or amends the plan to establish benefit levels and eligibility criteria, and a "fiduciary hat" when administering the plan or managing plan assets.[2] When amending a plan to create a new benefit and establish benefit eligibility requirements for it, as in the present case, the plan sponsor wears its "corporate hat" and is *not* acting as a fiduciary even if it is a named fiduciary of the plan.

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[1] Respondent argues that some of the cases cited in the petition are distinguishable because they involved welfare plans, rather than pension plans. This is a distinction without a difference, because the principle that plan design is not a fiduciary function applies to both types of plans.

[2] *E.g.*, *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) (ERISA allows an employer "to wear 'two hats,'" assuming fiduciary duties only when and to the extent it acts as plan administrator). The same principle is reflected in the decisions of every circuit, other than the Ninth, to consider this issue. Petition at 9-11.

Respondent's argument attempts to avoid this basic principle through circular reasoning. This is done by first asserting that Lockheed's amendment to the Plan violated a "substantive provision of ERISA." Opposition at 11. But respondent never identifies which "substantive provision" of ERISA was violated and for good reason: Lockheed's Plan amendment did not deny anyone the right to continued participation in the Plan, nor did it diminish anyone's vested pension benefit, nor did it cause the Plan to become underfunded. Petition at 7 & n.2. There is simply no "substantive provision" identified by either respondent or the Ninth Circuit that Lockheed failed to satisfy when it amended the Plan, because nowhere does ERISA prohibit a release as a condition for eligibility for additional benefits.

The Ninth Circuit attempted to overcome this logical flaw by relying upon ERISA § 406, 29 U.S.C. § 1106, holding that when Lockheed amended the Plan to require a release as an eligibility requirement for additional benefits, it engaged in a prohibited transaction. The crucial point which both respondent and the Ninth Circuit fail to acknowledge, however, is that this makes no sense unless Lockheed acted as a *fiduciary* when it amended its Plan. This is because the prohibited transaction provisions of § 406 regulate *fiduciary* conduct, so there cannot logically be a prohibited transaction without a fiduciary breach.[3] The problem

[3] Section 406(a)(1) begins by stating that "[a] fiduciary with respect to a plan shall not cause the plan to engage in a transaction. . .", and goes on to specify the transactions which are prohibited. 29 U.S.C. § 1106(a)(1). The decisions of other circuits recognize that § 406 regulates fiduciary conduct. *See, e.g., Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994); *Akers v. Palmer*, ___ F.3d ___, 1995 U.S. App. Lexis
(continued...)

with respondent's argument and the decision below, which is why American business is so alarmed (see briefs of *amici*), is that while it purports to sidestep the issue of whether Lockheed acted as a fiduciary when it amended the plan, it in fact held that it is exactly that conduct -- amending the plan in a sponsor capacity -- that triggers fiduciary liability. Because the Ninth Circuit held that amending the plan is fiduciary conduct,[4] there is a clear conflict with the other circuits. The Ninth Circuit's decision is a startling departure from settled law on an issue of extreme importance to plan sponsors and thus warrants this Court's intervention.

Respondent also fails to address several issues of significance which were raised in the petition. For example, respondent makes no mention of the Older Worker's Benefit Protection Act, which expressly contemplates the use of waivers in conjunction with early retirement programs. As Lockheed argued in the petition, it would be incredible for Congress to enact this legislation in 1990 if it had previously intended to outlaw altogether the use of waiver agreements in exchange for enhanced pensions through the prohibited transaction rule in ERISA § 406. Petition at 28. *Amici curiae* make the same point in their briefs. Brief of *Amici Curiae* ERISA Industry Committee, Association of Private Pension and Welfare Plans, and National Association of Manufacturers at 6-8; Brief of *Amicus Curiae* Equal Employment Advisory Council at 9-13.

[3] (...continued)
34607 (6th Cir. Dec. 11, 1995) ("The scope of ERISA's fiduciary duties is outlined in [29 U.S.C.] sections 1104 and 1106").

[4] The individual fiduciaries did nothing more than carry out and follow the terms of the Plan as amended.

Respondent also fails to acknowledge that the scope of the Ninth Circuit's decision will extend far beyond cases where the employer requires a release as a condition of receiving enhanced pension benefits as part of an early retirement window program. The Ninth Circuit did not limit its holding to release agreements: instead, it held that a plan sponsor violates ERISA whenever it receives a "significant benefit" through the amendment of an ERISA plan. Pet. App. at 18a. This covers a broad range of routine and common employer practices such as settling strikes, negotiating tradeoffs in labor contracts, attracting superior employees from competitors, or relieving pressure for higher wages. Petition at 26; Brief of *Amicus Curiae* Chamber of Commerce of the United States of America at 8-9. The decision below creates great uncertainly for plan sponsors throughout the nation anytime a pension plan is amended and the sponsor receives an ill-defined "significant benefit."

Unless reviewed and corrected by this Court, the decision below will surely have unwelcome consequences for plan sponsors and employees. It will no doubt lead to litigation, where ERISA plan sponsors are sued on the ground that the terms of a plan, or plan amendment, were designed to create or resulted in a "significant benefit" for the sponsor. It will also discourage employers from creating plans at all, or amending existing plans to add benefits, due to the certainty of litigation challenging benefit eligibility criteria or other plan design features under the much stricter fiduciary standards imposed by the decision below. The Court should therefore accept this case for review, in order to resolve the conflict between the circuits and to confirm that plan design decisions are not governed by fiduciary standards.

II. THE NINTH CIRCUIT'S APPLICATION OF *LANDGRAF* IS PLAINLY WRONG, INCONSISTENT WITH THE IRS INTERPRETATION OF OBRA 1986, AND WILL CREATE SIGNIFICANT LIABILITIES FOR EMPLOYERS THROUGHOUT THE NATION.

On the second issue presented by the petition, respondent acknowledges that this Court's decision in *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), represents controlling authority. Respondent argues, however, that Congress expressly provided for retroactive application of OBRA 1986 and that therefore the "default" rule that statutes are to apply prospectively does not come into play.

Despite making this assertion, respondent fails to identify any statutory language in OBRA 1986 which expressly provides for retroactive application, a result which is not surprising because there is no such statutory language. Instead, respondent relies chiefly upon the Ninth Circuit's misreading of the statutory phrase which prohibits an age-based reduction of "the rate of an employee's benefit accrual," 29 U.S.C. § 623(i)(1); 29 U.S.C. § 1054(b)(1)(H)(i), by arguing that the word "rate" actually means "total benefits accrued" rather than the rate at which the benefit is accrued. Opposition at 24 n. 22.

Respondent's argument essentially asks the Court to overlook the Ninth Circuit's misreading of the plain language of Sections 9201 and 9202(a)(2) of OBRA 1986 and decline to review this issue because it is a "matter of minimal import." Opposition at 28. Besides being factually unsupported, this argument ignores the interest of the nation's preeminent employer organizations, which view this case as sufficiently significant to urge this Court to grant review. Indeed, one *amicus curiae* conservatively

calculates that the retroactive application of OBRA 1986 results in additional pension liabilities of $1.7 billion. Brief of *Amicus Curiae* Chamber of Commerce of the United States of America at 18-19. The Ninth Circuit's erroneous decision to impose retroactive application of OBRA 1986 is not only plainly wrong but will ultimately result in an extraordinary additional burden to employers throughout the United States which was wholly unintended by Congress.

Respondent also errs by denying that the Ninth Circuit's decision conflicts with the IRS interpretation of OBRA 1986. Opposition at 9. Respondent later contradicts this argument by conceding that the IRS's proposed regulation does not require that a plan retroactively credit an employee, such as respondent, for prior years of service if the employee was not a participant prior to the effective date of OBRA 1986.[5] Opposition at 27. Respondent's further argument that a subsequent administrative interpretation -- IRS Notice 88-126 -- supports his position is also incorrect. The two key sentences in this notice state:

> The final regulations to be issued by the IRS under section 411(b)(1)(H) of the Code *will adopt the position taken in the proposed IRS regulations with respect to years of service that may not be disregarded because of age in determining benefits under noncontributory defined benefit plans*. Thus, the final regulations to be issued by the IRS will provide that the OBRA 1986 benefit accrual rules apply to all years of service (including years of service

[5] This concession is long overdue. Respondent previously argued in both the district court and the Ninth Circuit that the Proposed Regulation supports his position. Pet. App. at 13a n. 3.

> before January 1, 1988) completed by a *participant* in a noncontributory defined benefit plan who has at least 1 hour of service with the plan sponsor in a plan year beginning on or after January 1, 1988.

IRS Notice 88-126, 1988-2 C.B. 538 (1988) (emphasis added). Since respondent has now conceded that the Proposed Regulation is adverse to its position, it is not surprising that the first sentence quoted above has been conveniently *omitted* from respondent's discussion. The second sentence (which is quoted in the Opposition) does nothing to change the analysis -- it only notes that years of service completed by a *participant* in years before 1988 must be counted. Respondent was not, however, a participant before 1988, so this does not apply to him.

Finally, respondent is again less than candid with the Court in discussing the differences in effective date language between § 9204(a)(1) and § 9204(b) of OBRA 1986. In response to petitioner's argument that the difference in language only reflected Congress's desire to not affect the results of pending litigation concerning the Post-NRA Accrual Cessation Rule, respondent asserts that "nothing, however, in the statute or legislative history . . . supports this speculation about congressional motives." Opposition at 26 n. 26. This is contradicted not only by a statement in the Conference Report, Petition at 23 n. 14, but also by the statement of Representative Clay, the chair of the House Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, that Congress did not intend any inference to be drawn as to "whether and to what extent additional accruals and allocations might be required under current law," 132 Cong. Rec. 32,975 (October 17, 1986), since that was the issue of the then pending litigation. Instead, Representative

Clay confirmed that the purpose of OBRA 1986 was to provide employers with "prospective guidance" on the question of pension accruals. *Id.* This legislative history therefore confirms that OBRA 1986 applies prospectively. Review by this Court is required to correct the Ninth Circuit's erroneous imposition of such an enormous retroactive liability on the American business community.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition and the briefs of *amici curiae*, petitioners urge the Court to grant certiorari in this case.

DATED: January 2, 1996.

Respectfully submitted,

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